ministrative functions of the Commission work co-operatively in reorganization.' 'A proceeding under Section 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about reorganization if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render the provisions futile.'

"The acceptance of the plan by the South Western involves its merger or consolidation and conveyance of its properties to the reorganized Company. The plan expressly provides that this shall be done if the plan is accepted by South Western. The method is left by the plan to the reorganization Managers, subject to approval by the Court. The plan explicitly provides that the transfer of the property or its sale, consolidation, or merger, shall be subject to the further action of the Commission upon confirmation of the plan by the Court.

"Jurisdiction is conferred on the Commission by Section 5, par. 2 (a) of the Interstate Commerce Act of the matter of the consolidation, merger, purchase, lease or operation of carriers. And Section 5, Par. 11 of the Act provides 'The authority conferred by this section shall be exclusive and plenary.' Section 77 (b) of the Bankruptcy Act provides that the plan of reorganization may include 'the merger or consolidation of the debtor with another corporation.' Section 77 (f) of the Bankruptcy Act provides that upon confirmation of the plan the Commission shall grant authority 'for the transfer of any property, sale, consolidation or merger of the Debtor's property,' and that the Judge may require 'all other property and necessary parties to make any such transfer or conveyance.'

"The Bankruptcy Court and the Commission under the Federal Statutes have exclusive control of the matter of the merger or consolidation of South Western with the reorganized Company and the sale of the railroads of South Western to the reorganized Company. The proposal is made in the reorganization proceeding, and the acceptance or rejection must be made in the reorganization proceeding. What vote of stockholders is sufficient to authorize the South Western to act, the validity of its acceptance, and the validity of the conveyance to be made in consummation of the Plan are all questions for the Bankruptcy Court and the Commission. We hold that this Court as a Court of Bankruptcy, in connection with the powers conferred upon the Interstate Commerce Commission, has sole and exclusive jurisdiction in this matter, and that the attempt of the Plaintiff in the State Court suit to prevent the consummation of the Plan as it affects South Western, is an interference with the exclusive and prior jurisdiction of this Court.

"While the Georgia State Court would have, in an ordinary case, jurisdiction to decide the question whether a Georgia Railroad Corporation could convey its railroads without unanimous consent of its stockholders, the case which was brought in the State Court by Benton et al. had for its sole and only purpose the prevention of the acceptance of the Plan by South Western, notwithstanding they were aware of the fact, as is shown on the face of their petition, that the Commission and the Bankruptcy Court had already taken jurisdiction of the South Western for all purposes connected with the Plan of Reorganization. The Benton case seems to us a clear case of the invasion of the exclusive jurisdiction of the Commission and the Bankruptcy Court."

(Record, pages 56, 57 and 58.)

Thus the issue was made, and decided by Judge Scarlett in favor of the Central's Trustee.

Benton appealed to the Circuit Court of Appeals.

In the Circuit Court of Appeals, Merrel P. Callaway, as Trustee, and South Western Railroad Company, filed a joint brief as appellees.

At pages 7, 8 and 9 of that brief, they said:

> "Section 5 (2) (a) of the I. C. Act requires approval and authorization of the Commission for two or more carriers to consolidate, merge, or for any carrier to purchase, lease, or contract to operate the property of another carrier.
>
> "Section 5 (11) of the I. C. Act provides:
>
> " 'The authority conferred by this Section shall be exclusive and plenary.'
>
> "Section 5 (11) of the I. C. Act further provides (emphasis ours):
>
> " 'Any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, **of a majority, unless a different vote is required under applicable State Law, in which case the number so required shall assent,** of the votes of the holders of the shares entitled to vote of the capital stock of such corporation * * *) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction **without invoking any approval under State authority**; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction

approved or authorized under the provisions of this Section shall be and they are hereby relieved from the operation of the anti-trust laws and of all other **restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary** to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal Corporation, **but any power granted by this Section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.'** "

The phrase "unless a different vote is required under applicable State Law" should not be construed to mean a unanimous vote. If it should be construed to mean a unanimous vote, the Statute would be unworkable in such a case. The phrase means more or less than a majority. The words "applicable State law" we think mean statute law. The District Judge held, "These constructions are in harmony with and give effect to the further provisions of Subparagraph (11)."

> "The Supreme Court of the United States has held with reference to the provision in Section 5 (11) which relieves carriers from the operation of 'the anti-trust laws and all other restraints, limitations and prohibitions of law, Federal, State or municipal', that the scope of this immunity is not limited to all of the same genus as anti-trust legislation."
>
> New York Central Securities Co. v. U. S., 287 U. S. 12, 26;
>
> Texas v. United States, 292 U. S. 522, 534.

"We call special attention to the fact that a sale, consolidation or merger, does not require approval of State authority, that the carrier is relieved from restraints, limitations and prohibitions of law, Federal or State, and that any power granted by Section 5 (11) is in addition to and in modification of the powers of a corporation under its charter or under the laws of any State."

Then, at pages 9 to 11 inclusive, they quoted profusely from Section 77 of the Bankruptcy Act, and particularly from Subsection (f) thereof:

On pages 13 and 14 of their brief they said:

"The acquisition of South Western is provided for by the Commission in the Plan. Under sub-section (b) of Section 77 of the Bankruptcy Act, the Commission must find the Plan is in the public interest, and the Commission has so expressly found in this case.

"The question of public interest is a matter for the exclusive decision of the Commission.

Ecker v. Western Pacific R. Corp., 318 U. S. 448, 473, 474;

New York Central Securities Co. v. U. S., 287 U. S. 12, 24.

"The question, in the case of merger or consolidation of two carriers or the purchase of one carrier by another, whether it will be consistent with the public interest is especially committed to the Commission by Section 5, paragraphs 2 (a) and (b) of the Interstate Commerce Act."

The Circuit Court of Appeals reversed the District Court of the United States for the Southern District of Georgia (Benton et al. v. Callaway et al., 165 Fed. [2] 877). At page 879 the Circuit Court of Appeals said:

"The issue presented here is whether the court below had jurisdiction to stay proceedings in the state court and to annul the action previously taken therein. More definitely, the question is: did the bankruptcy court, in a reorganization proceeding under Section 77, Bankr. Act, 11 U. S. C. A., Section 205, have exclusive jurisdiction to determine whether the properties of South Western legally could be acquired by the Central of Georgia, on the terms set forth in the plan, by a mere majority vote of the stockholders of South Western?"

At pages 880-881 the Circuit Court of Appeals said:

"The suit in the state court, which was enjoined by the judgment below, was a proceeding in personam, between parties not in reorganization, over property that might never be acquired by the reorganized company. The Commission recognized this fact, and expressly provided that nothing in the plan should be construed as a grant of authority for the transfer of the debtor's property until further action of the Commission. The plan contemplated that the leased lines should be acquired upon the terms stated in the plan. The question submitted to the state court for decision was whether or not the fee of South Western's properties, exclusive of the lease, could be legally conveyed by the owner by a vote of a simple majority of its stockholders. This was peculiarly a question of state law. It was not a controversy over property in the actual or constructive possession of the Trustee."

And then, further on page 881, the Court said:

"The Commission envisaged a merger or consolidation as well as a purchase of the leased lines, but the activities of the trustee so far as this record shows have been directed principally to the acquisition of South Western's properties by purchase. The lessor

has been made an offer for its property upon specific terms, which it must accept or reject. If it rejects the offer, its lease will be disaffirmed. There is nothing in the plan to indicate that an ultra vires acceptance is authorized or required, or that any state law which prohibits acceptance should be disregarded. The plan does not provide that the leased lines may be acquired by a simple majority vote of the stockholders of the company."

And on pages 883 and 884 the Court said:

"The judicial process is brigaded with the administrative process in reorganization proceedings under Section 77. The bankruptcy courts and the Interstate Commerce Commission work cooperatively, but this does not mean that the statutory powers of the two departments are blended so that either may exercise the functions of the other. Each exercises its own distinct powers. The Court may judicially approve or affirm legislative or executive action by the Commission, but it is only the latter that has full power under Section 5 (11) to approve a sale, merger, or consolidation of two railroads with the assent of a majority of the stockholders unless a different vote is required under applicable state law. It is only upon action by the Commission, subject to confirmation by the court, that the reorganized company may carry such transaction into effect without invoking any approval under state authority and without regard to state or federal prohibitions.

"In thus transcending all existing legislation, it is the Commission, not the court, in reorganization proceedings that is exercising the delegated legislative power of congress under the Constitution to regulate commerce. Const., art. 1, Section 8, cl. 3. This accounts for the concluding sentence of the paragraph to the effect that no federal corporation is deemed

created thereby, but that any power therein granted to any carrier shall be in addition to and in modification of its powers under its corporate charter or under the laws of any state. **This provision does not authorize the Commission to compel a railroad corporation, which is not a debtor in reorganization proceedings, to enter into a sale, lease, merger or consolidation, but authorizes, the carrier, with the required assent of its stockholders, to participate in any such transaction with the approval of the Commission. Neither does it authorize the bankruptcy court to compel a lessor not in reorganization to sell its property to the debtor, or to a reorganized company. It has no application to the controversy now being litigated in the state court between the stockholders of South Western.** The suit in the state court was intended to prevent the illegal conveyance of South Western's interest that was not subject to the lease. Such contingency was within the contemplation of the Commission when the plan was promulgated.

"Every plan of reorganization of a railroad, within the meaning of Section 77, is required to provide adequate means for its execution, which may include 'the amendment of the charter of the debtor'; but there is no authorization for the court to amend the charter of a creditor or lessor that is not a debtor in reorganization. Upon confirmation of the plan, which is subject to judicial review, the debtor, or any other corporation organized for the purpose of carrying out the plan, shall have full power to put it into effect; and shall do so; the laws of any state to the contrary notwithstanding (note 13: 11 U. S. C. A., Section 205, Sub. f). Evidently there must be a real or substantial conflict between the plan and any state law before the latter may be disregarded. The execution of the plan is 'subject to the supervision and control of the Judge,' Sec. 205, Sub. f, supra; and this ought to be assurance

enough that state authority will be overridden only to the extent necessary to make the plan effective. We have been cited to no provision in the plan that conflicts with any law of Georgia." (Emphasis ours.)

The Court will note that the first phrase emphasized commences "This provision." The "provision" to which the Court was there referring is shown in Note 11 on page 883, to be 49 U. S. C. A., Section 5 (11).

Mr. Callaway, as Trustee, and the South Western Railroad Company were not content with the decision of the Circuit Court of Appeals. So they filed a petition to the Supreme Court of the United States for the writ of certiorari.

To show that they were then litigating the question which they sought to re-litigate in the State Courts and which they now seek to re-litigate, we quote from their former petition for the writ of certiorari as follows:

"The jurisdiction of the Interstate Commerce Commission under Section 5 (11) of the Interstate Commerce Act is exclusive and plenary over the merger and consolidation of railroads and the acquisition of one railroad by another, and under this section, carriers are relieved from the 'restraints, limitations and prohibitions of law, Federal and State or municipal insofar as may be necessary to enable them to carry into effect' the transaction approved by the Commission. The Plan provides in its last paragraph (as is usual in all Plans), 'That nothing herein contained shall be or be construed as a grant of authority for the issue of any securities, assumption of obligations, transfer of property, sale, consolidation or merger of the Debtor's property * * * until further action by the Commission upon confirmation of the Plan by the Court.' This language is taken from

Sub-Section (f) of Section 77 of the Bankruptcy Act. It is for the Commission to find whether the proposed acquisition is supported by proper corporate authority, and the Commission would certainly have power to relieve against unanimous consent of Stockholders. No Court, State or Federal, has power to usurp this exclusive and plenary power of the Commission. The Commission has expressly reserved this power in the Plan. The majority opinion disregards this question altogether, although it was expressly decided by the District Court. The majority opinion has expressly sanctioned the jurisdiction of the State Court over this matter, although under the Federal law it is expressly reserved to the Commission. The failure of the majority opinion to give effect to the exclusive power of the Commission is directly contrary to the decisions of this Court in the cases of Thompson, Trustee, v. Texas-Mexican Ry. Co., 328 U. S. 134; and Smith v. Hoboken R. R. Co., 328 U. S. 123; Palmer, Trustee, v. Mass., 308 U. S. 79; Texas v. United States, 292 U. S. 522; Cleveland, C. C. & St. L. Ry. v. United States, 287 U. S. 12, 26, 27. The District Court had the right and duty to enjoin the State Court proceeding on this ground, because the Court and the Commission work cooperatively in reorganization. Palmer v. Mass., 308 U. S. 79, 87; Smith v. Hoboken, 328 U. S. 123, 132; Warren v. Palmer, 310 U. S. 132, 137, 138.

"(i) The majority opinion is contrary to and does not consider (1) the provisions of Sub-Section (b) of Section 77 of the Bankruptcy Act, which provides that a plan of reorganization 'shall provide adequate means for the execution of the Plan, which may include the transfer of any interest in or control of all or any part of the property of the Debtor to another corporation or corporations, the merger or

consolidation of the Debtor with another corporation or corporations, etc.'; (2) the provisions of Sub-Section (f) of Section 77 of the Bankruptcy Act which grant authority to carry out the Plan under the supervision and control of the Judge 'the laws of any State or the decision or order of any State authority to the contrary notwithstanding'; (3) the provisions in the Plan which give the District Court the power to construe it.

"(j) The Commission has the power under Section 5 (11) of the Interstate Commerce Act to authorize the acquisition, even if the law of Georgia should prohibit it, or if the acquisition requires unanimous consent under the law of Georgia, because the Federal law is superior to the State law in this matter.

"(k) The majority opinion erred in stating; 'For the Bankruptcy Court to hold that a majority vote of the Stockholders of South Western would be sufficient, regardless of State law, would amount to amending the Plan in the face of the Statute which provides that no plan shall be approved or confirmed by the Judge "unless the Plan shall have first been approved by the Commission and certified to the Court."' The plan has been promulgated by the Commission, and the Court long ago approved the Plan. Certainly, it is competent for the District Court to decide that the Commission has power to approve and allow the acquisition, notwithstanding the Georgia law may be as stated by the State Court Judge, that South Western cannot convey its property without unanimous Stockholder consent. The decision of the Bankruptcy Court does not amend the Plan. The Commission is yet to pass 'on the question of transfer of property as we have pointed out.' The majority opinion in substance and effect turns

the State Court loose to decide a question over which the Commission has exclusive and plenary authority.

"(l) The majority opinion erred in holding that the question submitted to the State Court 'was peculiarly a question of State law.' The question is solely one of Federal law. If it was dissociated from the Reorganization Plan, it would have been peculiarly a question of State law, but when the question relates to the Reorganization Plan it ceases to be a question of State law and becomes a question of Federal law.

"(m) The observation of the majority opinion that 'A solvent corporation * * * cannot be constitutionally compelled against its will to convey to the debtor, etc.' is irrelevant. No one is seeking to compel South Western to convey its property 'against its will.' The Directors of the Corporation and a large majority of the Stockholders are willing and anxious to convey the property. A small minority is seeking to prevent the Corporation from consummating the Plan as it relates to South Western. The District Court simply says that in its opinion this small minority cannot lawfully do this.

"(n) The majority opinion states: 'There is nothing in the plan to indicate that an ultra vires acceptance is authorized or required or that any State law which prohibits acceptance should be disregarded. The Plan does not provide that the leased lines may be acquired "by a simple majority vote of the Stockholders of the Company." Naturally, the Plan did not carry any such provision as suggested.' No one ever mooted any incapacity on the part of South Western until the Benton case was filed. Moreover, the matter is one for the exclusive jurisdiction of the Commission when it comes finally to approve the

transfer of properties, and we do not imagine that the question will present any difficulty to the Commission."

(Petition for the Writ of Certiorari, in Callaway et al. v. Benton et al., No. 607, October Term, 1947, pages 9-13.)

Your Honors granted the petition for certiorari, and thus agreed to hear the case on its merits.

Again the Trustee and the South Western Rail Road Company filed a joint brief. Still arguing the same question which they sought to relitigate in the State Courts and now seek to relitigate, at pages 43-45, inclusive, of that brief (in the case of Callaway et al. v. Benton et al., Supreme Court of the United States, October Term, 1948, No. 21), they said:

"THE COMMISSION HAS EXCLUSIVE AND PLENARY POWER OVER THE SUBJECT OF THE MERGER, OR CONSOLIDATION OF RAILROADS OR THE PURCHASE OF ONE RAILROAD BY ANOTHER.

"Section 5 of the Interstate Commerce Act confers power on the Interstate Commerce Commission in the matter of the consolidation or merger of rail carriers and the purchase of the property of one rail carrier by another rail carrier, and Section 5 (2) prescribes the procedure therefor. Under Section 5 (4) it is unlawful for any person to enter into any such transaction without authority of the Commission. Section 5 (11) provides 'The authority conferred by this Section shall be **exclusive and plenary,**' and that any corporation participating in such transaction shall have full power to carry such transaction into effect 'with the assent * * * of a majority, unless a different vote is required under applicable State law, in which case the

number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation. * * * **without invoking any approval under State authority,'** and that any corporation or their officers or employees participating in such transaction **'shall be and they are hereby relieved from the operation of the anti-trust laws and of all other restraints, limitations and prohibitions of law, Federal, State or municipal as may be necessary to enable them to carry into effect the transaction so approved** * * * any power granted by this Section to any carrier or other corporation **shall be deemed to be in addition to and in modification of its powers under its corporate Charter or under the laws of any State.'** (Emphasis quoted.)

"This Court has held with respect to the above provision which relieves carriers from the operation of the 'anti-trust laws and all other restraints, limitations and prohibitions of law, Federal, State or Municipal,' that the scope of this immunity is not limited to laws of the same genus as anti-trust legislation.

New York Central Securities Co. v. U. S., 287 U. S. 12, 26;
Texas v. U. S., 292 U. S. 522, 534.

"The phrase in Section 5 (11) above, 'unless a different vote is required by State Law,' should not be stretched so as to include a law which required a unanimous vote. Such a construction would render the statute unworkable. The phrase naturally means more or less than a majority. We have never heard of a law which required a unanimous stockholder vote for corporate action. The contention in the Benton suit is that a conveyance by South Western is ultra vires. The State Court Judge held that the conveyance could not be made except by unanimous consent of stockholders.

"The phrase 'applicable State law' means Statute law.

"The Court of Appeals in its majority opinion stated: 'There is nothing in the plan to indicate that an ultra vires acceptance is authorized or required or that any State law which prohibits acceptance should be disregarded. The plan does not provide that the leased lines may be acquired by a simple majority vote of the stockholders of the Company.' Naturally, the plan does not contain any statements of this kind.

"The Federal Statutes which we have quoted above explicitly provide for acquisition on a majority vote unless a different vote is required under State law, and relieves the carrier from any restraints, limitations and prohibitions of State law."

This is the end of the quotation from their brief.

After our brief had been filed they filed a reply brief in the Supreme Court of the United States in the case aforesaid (No. 21, October Term, 1948), and said:

"AS TO THE CONTENTION IN RESPONDENTS' BRIEF THAT NEITHER THE PLAN NOR THE ORDER OF COURT APPROVING THE PLAN PROVIDE THAT THE PROPERTIES OF SOUTH WESTERN MAY BE ACQUIRED BY A SIMPLE MAJORITY VOTE OF THE STOCKHOLDERS OF THE COMPANY.

"The Plan did not say anything about the vote of stockholders, because this is a matter which is regulated by the Federal Statutes, Section 5 (11) of the Interstate Commerce Act provides for a majority vote of stockholders unless a different vote is required under applicable State law. This Section further relieves the carrier from the 'restraints, limitations and

prohibitions of law, Federal, State or Municipal, in so far as may be necessary to enable them to carry into effect the transaction so approved'; and this Section further provides that the powers granted by the Section 'shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.' The authority conferred by this section is 'exclusive and plenary.' If there is any State Statute which comes into conflict with this Federal Law, the State Statute must yield.

"Section 77 (f) of the Bankruptcy Statute gives authority to carry out the plan, 'the laws of any State or the decision or order of any State authority to the contrary notwithstanding.'

"The reorganization is controlled by Federal Law and not by State Law.

"We have called attention in our main brief (p. 9) to the provision in the last paragraph of the Plan (R. 47) which provides that nothing contained in the plan shall be construed as a grant of authority for the issue of securities, transfer of any property, sale, consolidation or merger of the Debtor's property 'until further action by the Commission upon confirmation of the plan by the Court.' **Benton's suit was brought before the confirmation of the plan and the State Court usurped the functions and power of the Commission and the Reorganization Court in decreeing that the South Western should not accept the plan without unanimous stockholder consent.** The State Court passed this decree after South Western's stockholders by a large majority had assented to the plan and the corporation had notified the Commission of its acceptance." (Emphasis ours.)

(Their Reply Brief in the Supreme Court of the United States, pages 1, 2 and 3.)

Your Honors, two Justices dissenting affirmed the judgment of the Circuit Court of Appeals, which had reversed the judgment of the Bankruptcy Court.

In so doing, Your Honors, in the course of your opinion (336 U. S. at pages 136-7) (69 Supreme Court at page 439, 93 L. Ed. 447-8) said:

> "The District Court's injunction was based primarily on the premise that the plan of reorganization requires the inclusion of South Western's lines within the system of the reorganized company. The state action is said to be an attempt on the part of respondents 'to prevent the consummation of the plan as respects South Western.' Again, the court held that 'the question of the consolidation, merger and sale, and under what conditions South Western may convey its property to the reorganized company, in consummation of the plan, is not a question of State law; it is a question of bankruptcy law—a question which arises under the bankruptcy Act and the Interstate Commerce Act.' The Court's conclusion was, therefore, that although the question whether a Georgia Railroad Corporation can convey all of its properties without unanimous consent of its stockholders would ordinarily be one of State law cognizable in the state's courts, under these circumstances the decision was one for the bankruptcy court applying federal law.
>
> "We do not agree. The language of the plan and the factors which the Commission took into consideration in arriving at the amount offered South Western for its properties indicate clearly that, so far as the reorganization plan contemplates acquisition of the lessor railroad, the ordinary rules of offer and acceptance were intended to apply. That has invariably been the practice. As a consequence, we have held that the amount which may be offered a

lessor is a question of 'business judgment'; that 'if the Commission deems it desirable to keep the leased lines in the system, it must necessarily have rather broad discretion in providing modifications of the lease where, as here, the lessor is not being reorganized along with the debtor. For under that assumption the modification must be sufficiently attractive to insure acceptance by the lessor or its creditors.' Group of Institutional Investors v. Chicago, M., St. P. & P. R. Co., 1943, 318 U. S. 523, 550, 63 S. Ct. 727, 742, 87 L. Ed. 959. The plan itself recites that the leased lines are to be acquired only 'if they can be acquired on the terms hereinafter set forth'. Otherwise, the lease is to be disaffirmed and the property returned to the lessor. In addition, the record is replete with statements by the Commission, the court, and the parties that South Western's stockholders are to have the choice open to any offeree; an unfettered right to accept or reject.

"Under these circumstances, we can see no reason why the ordinary incidents of a sale of the assets of a corporation should not be applicable. One of the most important of these is, of course, the question of the proportion of a corporation's stock which must be voted in favor of accepting the offer of purchase in order to make its acceptance effective. Since, as the district court held, this would ordinarily be a question of Georgia law, we believe that substitution of any other rule of law is erroneous."

With respect to Section 5 (11) of the Interstate Commerce Act, Your Honors said (336 U. S. 139-40, 69 Sup. Ct. Rep. 440, 83 L. Ed. 449):

"The district court sought to find a federal rule permitting acceptance by a simple majority vote of the shareholders in the provisions of Section 5 (11) of the Interstate Commerce Act. **But that section re-**

lates to voluntary mergers, not to the purchase of a leased line as part of a plan of reorganization. The Commission can undoubtedly carry on Section 5 proceedings simultaneously with Section 77 reorganization proceedings, see United States v. Lowden, 1939, 308 U. S. 225, 60 S. Ct. 248, 84 L. Ed. 208, **but that procedure was not followed in this case.** The Commission preferred, instead, to carry out the consolidation under the authority of Section 77, sub. b (5) of the Bankruptcy Act, which provides that the plan of reorganization may include 'the merger or consolidation of the debtor with another corporation or corporations'. That power flows from a different source than the power over consolidation under the Interstate Commerce Act. While some of the findings required of the Commission under the two Acts are similar, and Section 77, sub. f provides that consolidation and merger of the debtor's property shall not be inconsistent with the provisions and purposes of Chapter 1 of the Interstate Commerce Act, their procedural and jurisdictional requirements do not overlap. It may be noted in addition that Section 5 (11) contains a proviso that the majority vote provision shall not apply 'unless a different vote is required under applicable State law, in which case the number so required shall assent.' Whether that proviso is operative when a state's law requires unanimous consent of the shareholders is a question we need not decide." (Emphasis ours.)

So, with respect to that section of the Interstate Commerce Act which was plead in the amendment of April 26, 1949, both by South Western and the Central (Certiorari Record, pp. 105 seq.), your Honors have distinctly said that "it relates to voluntary mergers, not to the purchase of a leased line as part of a plan of reorganization." Your Honors pointed out that the Commission

could have carried on Section 5, proceedings simultaneously with Section 77 reorganization proceedings, but that "that procedure was not followed in this case."

But this is not all. Your Honors then discussed Section 77 (f) of the Bankruptcy Act. [XI U. S. C. A., Section 205 (f).]

With respect to that section and immediately following the quotation just hereinabove set out, your Honors said:

> "Nothing we have said derogates in any way from decisions of this Court upholding the power of the Interstate Commerce Commission, in the exercise of its statutory obligations, to override state laws interposing obstacles in the path of otherwise lawful plans of reorganization. We have recently reaffirmed that power in cases arising under the Interstate Commerce Act (citing Seaboard Air Line R. Co. v. Daniel, 333 U. S. 118, 68 S. Ct. 426; Schwabacher v. United States, 334 U. S. 182, 68 S. Ct. 958; State of Texas v. United States, 292 U. S. 522, 65 S. Ct. 819, 78 L. Ed. 1402). Nor is the ambit of federal power less broad in cases arising under the bankruptcy laws of the United States. Section 77, sub. f of the Bankruptcy Act specifically provides that the plan of reorganization shall be put into effect, 'the laws of any State or the decision or order of any State authority to the contrary notwithstanding.' **The statute does not, however, give the Commission or Court the right to require acceptance by a lessor not in reorganization of an offer for the purchase of its property, and no such power has been asserted by the Commission in this case. The plan of reorganization in effect hands South Western a contract of sale. Whether or not South Western signs the contract must depend not only upon its business judgment, but also upon the charter of the company and the laws of the state of its incorporation.**

> **THERE IS, THEREFORE, NO OCCASION TO OVERRIDE STATE LAW. THE PLAN IMPLICITLY ACCEPTS IT AS CONTROLLING.** The fact that the law may make acceptance of the offer less likely than would be the case if the offeree were incorporated elsewhere does not change the picture. We do not believe that Congress intended to leave to individual judges the question of whether state laws should be accepted or disregarded, Palmer v. Massachusetts, 1939, 308 U. S. 79, 60 S. Ct. 34, 84 L. Ed. 93, or to make the criterion to be applied by the effect of the law upon the prospects of acceptance by the offeree" (336 U. S., at pages 140-141, 69 Sup. Ct. Rep. 441, 93 Law Ed. 449-50). (Emphasis ours.)

Your Honors will notice that you alluded in the foregoing quotation (Note 10) to the cases of Seaboard Air Line R. Co. v. Daniel, and Schwabacher v. United States, after citing them the Court alluded to the fact that Section 77 (f) of the Bankruptcy Act specifically provides that the plan of reorganization shall be put into effect, "the laws of any State or the decision or order of any State authority to the contrary notwithstanding." But then and immediately after quoting that provision of the Bankruptcy Act, your Honors graphically pointed out why it did not apply in this case, in language which we have emphasized in the foregoing quotation.

That language concludes with these cogent sentences: " 'There is therefore no occasion to overide state law. The plan implicitly accepts it as controlling.' "

Your ruling there in this very controversy ties in with the phrase "to the extent contemplated by the plan" in Section 77 (f), part of which is set out in the Petitioner's Amendments in the State Court suit whereby they sought to relitigate this question (Certiorari Record, pp. 106, 111).

In the very last paragraph of the majority opinion (336 U. S., at pages 150-151, 69 Sup. Ct. Rep. 446, 93 L. Ed. 459) your Honors said:

> "We conclude that under the narrow facts presented here the bankruptcy court erred in enjoining the state court suit leading to a determination of the requirements of Georgia Law with respect to sale of the entire assets of South Western. This question was already in litigation in the state court when first raised in the federal court. Title 28 U. S. C., Section 2283; 28 U. S. C. A., Section 2283, forbids this exercise of power, since, as we hold, the controversy does not involve property of the debtor within the jurisdiction of the bankruptcy court, and the assertion of jurisdiction by the state court is not inconsistent with the provisions of the Bankruptcy Act."

CONCLUSION.

So, we most respectfully contend that the Writ of Certiorari prayed for should not be granted for that: (a) The first question presented, when properly analyzed, is really one of State Law—one which this Court on the previous appeal said was for determination by the State Court; (b) The second question was decided adversely to the petitioners on the former appeal of this case.

We must advert to one portion of the brief of counsel for the petitioners in support of their petition for Certiorari. At page 7 thereof they say:

> "(c) The Supreme Court of Georgia substantially concedes in its opinion that there was no contract between the State and the Corporation that it would not sell its properties and franchises if the State consented; and put its decision squarely on the proposition that there was such a contract between the

stockholders inter sese, and between the Company and its stockholders.

"Counsel for Respondents in his brief in the Supreme Court of Georgia concedes that there was no such contract between the Corporation and the State, but contends that the contract was between the stockholders themselves and between the Company and its Stockholders. His brief says, referring to the Act of 1933:

"'All that Act can constitutionally do, and perhaps all that the General Assembly intended it to do, was to give the authority of the State (note particularly the language in it "authorized to sell"), to a sale. The State simply said to the Corporation "so far as your contract with us as contained in your charter is concerned, you may sell if your Board of Directors agree, and the holders of a majority of your stock assent." The State did not and constitutionally could not impair the other parts of the contract; the contract between the stockholders and the corporations; the contract between the stockholders themselves.'"

We most respectfully submit that a reading of the opinion of the Supreme Court of Georgia will demonstrate that that Court did not therein substantially concede "that there was no contract between the State and the Corporation that it would not sell its properties and franchises if the State consented."

And we most emphatically deny that we conceded in our brief in the Supreme Court of Georgia "that there was no such contract between the Corporation and the State."

We conceded no such thing.

On the contrary, we had alleged in our original petition (par. 55, Cert. Record, p. 18) that the charter of South Western "is a contract between the State of Georgia and

the South Western Railroad Company and its stockholders * * *."

And at pages 29 and 30 of our brief in the Supreme Court of Georgia we argued:

> "The Court below saw very clearly that the charter of South Western constituted a contract not only between the State of Georgia and the corporation, but also between the State and the stockholders and between stockholders therein.
>
> " 'It has been said that the charter of a private corporation operates on a threefold relationship, to establish a contract between the State and the corporation, between the corporation and its stockholders and between the stockholders and the State, and also that it constitutes a contract between the stockholders inter sese.'
>
> 16 Corpus Juris Secundum, page 756, Constitutional Law, Section 319.
>
> "The State of Georgia, through its legislature, might **with the proper consent of the stockholders of South Western** alter the contract as between the State and the corporation, but 'it was not competent for the legislature to do more in this respect than to waive the public rights. It could not divest or impair the rights of the shareholders as between themselves, as guaranteed by the company's charter, without their consent.' " (Emphasis supplied.)

The language quoted by counsel for the petitioners as coming from our brief was contained in a supplemental brief filed by us in the Supreme Court of Georgia. Even the language quoted was not a "concession" so broad as now contended by counsel for the petitioners. For there it was simply being argued that the authority granted by the State in the Act of 1933 could not be accepted by the

corporation except by unanimous vote of the stockholders. This is demonstrated by the sentence which immediately preceded the language quoted from our brief. That sentence was: "Now, doesn't it follow as the night the day that if it takes unanimous stockholder action to make the General Railroad Law applicable to a company chartered prior to 1863 (and this Court has said that it does in Alexander v. A. & W. P., 108 Ga. 151), it takes like unanimous action for a sale or conveyance to be made under the Act of 1933, although that Act authorizes a sale when assented to by the holders of a majority of the stock" (our supplemental brief in Supreme Court of Georgia, p. 3).

But even had the Supreme Court of Georgia "put its decision squarely on the proposition that there was such a contract between the stockholders inter sese, and between the Company and its stockholders," such decision would have been eminently correct.

> "It is also well settled that the articles of incorporation of a corporation organized and incorporated under the general laws of a state create a contract between **the state and the stockholders** to the same extent as does a charter granted by the Legislature of the State. In either case, the contract arising therefrom is protected by the Federal Constitution, and the contract thus created cannot be impaired by a subsequent act of the Legislature. This is settled by the Dartmouth College case, 4 Wheat. (17 U. S.) 518, 4 L. Ed. 629. * * *." (Emphasis ours.)
>
> Haberlach v. Tillamook County Bank, 72 A. L. R. 1245, 1249.

> "We have supposed, if anything was settled by an unbroken course of decisions in the Federal and State courts, it was, that an act of incorporation was a contract between the State and the stockholders.

All courts at this day are estopped from questioning the doctrine. The security of property rest upon it, and every successful enterprise is undertaken, in the unshaken belief that it will never be forsaken."

The Binghamton Bridge, 3 Wallace 51, 73 (Supreme Court of the United States, December, 1865).

The Supreme Court of Georgia long ago (1871) announced this same rule in Hazlehurst v. Savannah & C. R. Co., 43 Ga. 13, 55. The Supreme Court of Georgia cited and applied the Hazlehurst case in the decision of which review is now sought (206 Ga., at p. 788).

And at pages 790-791 (of 206 Ga.), the Supreme Court of Georgia in deciding the question of Georgia law, which Your Honors had said it was empowered to decide, said:

"As already pointed out, the Charter of the South Western, after defining the object of the Company to build a railroad from Macon to the Chattahoochee, contains these words: 'That the Company . . . shall confine their efforts and enterprise to the City of Macon to some point intermediate between Albany and Fort Gaines,' etc. The minority stockholders are owners of stock in a corporation created for this limited purpose, and under the charter it had no right to sell its franchises and physical property. If the act of 1933 (Ga. L. 1933, p. 235), relied on by the plaintiffs in error, be considered as an amendment of this charter, it would constitute a fundamental, radical, and vital change in the charter, and the contract of the stockholders, by authorizing the corporation to abandon the very enterprise it was created to carry on and to sell its franchise and physical properties, and take in payment therefor and hold bonds of another corporation, and thus become a holding

corporation only of the securities of another corporation; and this could not be done without the unanimous consent of the stockholders. In Alexander v. Atlanta & West Point R. Co., 108 Ga. 151 (33 S. E. 866), it was held: 'The Atlanta and West Point Railroad Company has no authority under its charter to build a belt railroad from any point on its road to any other railroad. When proposed amendments to a charter are fundamental, radical, or vital, the unanimous consent of the stockholders to their acceptance is essential. The corporate rights and privileges embraced in the general railroad law of this State, taken as a whole, would fundamentally, radically, and vitally amend the charter of the above-named company, if added thereto, and consequently could not be so added upon an application presented to the Secretary of State by virtue of a resolution adopted by a majority only of the stockholders. Thus adopting such a resolution was not, in this case, "proper corporate action" '. See also Central Railroad Co. v. Collins, 40 Ga. 582 (4) (supra); Macon Gas Co. v. Richter, 143 Ga. 397 (85 S. E. 112); Johnson v. Tribune-Herald Co., 155 Ga. 204 (116 S. E. 810); McKenzie v. Guaranteed Bond & Mortgage Co., 168 Ga. 145 (1) (147 S. E. 102), and cases therein cited. If this act of 1933 (Ga. L. 1933, p. 235) be not considered as an amendment to the charter, then the legislature could not by a general law do that which it could not do by specific amendment."

We most respectfully submit that the petition for the writ of certiorari should be denied.

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